APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

January 9, 1969

Before:

Hon. ROGER J. KILEY,
Circuit Judge

Hon. LUTHER M. SWYGERT,
Circuit Judge

Hon. WALTER J. CUMMINGS,
Circuit Judge

No. 17320

HARPER & ROW PUBLISHERS, INC., *et al.*,
Petitioners,

—VS.—

HONORABLE BERNARD M. DECKER,
United States District Judge,
Respondent.

ORDER

On December 13, 1968, petitioners filed in this court their Original Petition for a Writ of Mandamus seeking

to expunge respondent's order of December 13, 1968, compelling production of certain documents in a district court proceeding. Simultaneously, petitioners filed a motion for stay of execution of the district court order. This court on December 13, 1968, entered the stay order.

On December 20, 1968, petitioners filed their Amended Petition for Writ of Mandamus, and thereafter, pursuant to this court's order, filed their brief in support of the Amended Petition. On December 26, 1968, this court ordered respondent to answer the petition, "with supporting brief," on or before January 6, 1969. Respondent's Answer to Petition for Writ of Mandamus with Supporting Brief was filed January 6, 1969.

On consideration of the Amended Petition for Mandamus and the respondent's Answer, and being fully advised, the court finds that the entry of the order of December 13, 1968, in the district court for production of documents did not constitute a usurpation of power, *Will* v. *United States*, 389 U.S. 90, 95, and that petitioners have not shown a clear right to the extraordinary writ of mandamus.

IT IS THEREFORE ORDERED that the Amended Petition for Mandamus be and it is hereby denied.

IT IS FURTHER ORDERED that respondent's request for allowance of attorneys' fees be and it is hereby denied.

A True Copy:
Teste:

KENNETH J. CARRIDE
Clerk of the United States
Court of Appeals for the
Seventh Circuit.

APPENDIX B

In pertinent part, Judge Decker's July 16, 1968 Order provided as follows:

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

No. 67 C 1899

STATE OF ILLINOIS,

Plaintiff,

—VS.—

HARPER & ROW, PUBLISHERS, INC., *et al.,*

Defendants.

No. 67 C 1906

STATE OF WEST VIRGINIA,

Plaintiff,

—VS.—

HARPER & ROW, PUBLISHERS, INC., *et al.,*

Defendants.

Order Granting Leave to Plaintiffs and Defendants to Propound Interrogatories and Ordering Production of Documents by Defendants

(National Pretrial Order No. 1)

A pretrial conference having been held on July 11, 1968, and counsel having been heard, and due deliberation having been had, it is ordered, severally in each of the above actions, that:

* * * * *

(7) *Production of Documents by Defendants*:

(a) *Production of Documents*: For good cause appearing, it is hereby ordered that each of the defendants shall, on or before December 15, 1968, produce and deposit with the Clerk of this Court, or in a document depository as hereinafter provided, the original or legible photocopies of each of the documents described in Exhibit E annexed hereto;

* * * * *

Enter:

Bernard M. Decker
United States District Judge.

Dated: July 16, 1968.

EXHIBIT E

PRODUCTION OF DOCUMENTS BY DEFENDANTS

I. Definitions

A. As used herein, "document" includes any written, printed, typed, recorded or graphic matter however produced or reproduced, prepared during or referring or relating, unless otherwise specified, to the period from January 1, 1959 to April 18, 1967, concerning the products defined in the complaint (unless otherwise specified), now in the possession, custody or control of the defendant companies, including documents at any time in the possession, custody or control of their domestically domiciled subsidiaries or merged or acquired predecessors.

B. As used herein, the term "the products defined in the complaint" or "library books" shall mean library books as defined in the complaints or as defined in defendants' answers to Plaintiffs' First Set of Interrogatories to Defendants (Exhibit A of the annexed Order).

C. As used herein, "interrogatories" mean plaintiff's first set of interrogatories and "answers" mean answers of the respective defendants to those interrogatories.

D. As used herein, "you" or "your", unless otherwise specified, means the defendant corporation producing the documents requested herein, its subsidiaries and predecessors, its present and former officers, executives, directors, agents and employees and all other persons acting or purporting to act on behalf of the defendant corporation or its subsidiaries or predecessors.

II. Time Period

The discovery called for herein refers to the period from January 1, 1959 through April 18, 1967. Documents prepared subsequent to the foregoing period but which relate or refer thereto or to any portion thereof are to be included.

III. Documents to Be Produced by All Defendants

1. Each document produced in response to a grand jury subpoena in the Northern District of Illinois, Eastern Division in the course of investigations of the publishing industry and in particular library editions of children's books, and copies of the grand jury subpoenas themselves, including the documents produced by defendant and/or copies of documents produced by others in the defendant's custody or control.

2. All existing lists or other identifying descriptions, prepared by any defendant, of documents furnished to any officer or agency of the United States or of any state or municipal government in connection with any legislative, administrative or judicial investigation, hearing or proceeding involving the pricing or marketing of the products defined in the complaint and copies of each subpoena and other written request pursuant to which such documents were furnished.

3. Each document taken or received or prepared at any meeting (which meeting and which document relate to prices, bids, terms and conditions of sale, or allocation of markets) attended by any person employed by you having pricing responsibility and by any person employed by any other defendant or alleged co-conspirator named in the

complaint herein during the period from January 1, 1959 to April 18, 1967.

4. During the period from January 1, 1959 to April 18, 1967 all circular letters and all market letters, reports, bulletins, instructions or other documents of general circulation among defendant's salesmen or other persons having pricing or sales responsibility concerning explanations for changes in prices, price adjustment clauses, terms of payment, or relating to technical or quality changes of payment, or relating to technical or quality changes with respect to the product defined in the complaint.

5. All documents during the period from January 1, 1959 to April 18, 1967 relating to investigations made by defendants or persons employed by defendants of alleged violations by it or its employees of the antitrust laws of the United States or of the company's written policy prohibiting employees to meet with competitors to discuss prices of the product defined in the complaint, including reports of interviews with persons employed by the company at any time; and documents relating to recommendations or actions in dealing therewith.

6. Such charts or other documents as will show the organization, and changes therein, of the defendant during the period January 1, 1959 through April 18, 1967.

7. Each document referring or relating to or reflecting the specific circumstances under which you obtained notification of actual or proposed price changes of your competitors or obtained possession of price catalogs, price sheets, price lists or other documents setting forth prices or terms and conditions of sale of your competitors.

8. The personal and company copy of each expense account, travel voucher and supporting documents, diary, appointment note, appointment book, calendar pad, letter book or file, and telephone call memorandum, for each officer and employees with pricing authority and his immediate assistants.

A True Copy Attest

ELBERT A. WAGNER, JR., *Clerk*

By: JOHN BORRIS
Deputy Clerk
U. S. District Court, Northern
District of Illinois

Date: Jan. 21, 1969

APPENDIX C

UNITED STATES DISTRICT COURT

Chicago 60604

November 27, 1968.

To: All Attorneys of Record.

Re: *State of Illinois* v. *Harper & Row Publishers, Inc., et al.—No. 67 C 1899, and Related Cases.*

Gentlemen:

You are hereby notified that a pretrial will be held in this consolidated action in Courtroom 2141 at 10:30 A.M. on Friday, December 13, 1968. At said pretrial, the matters noted in the agenda attached hereto as Exhibit A will be discussed in the order set forth in said agenda.

In addition, several matters require your attention prior to the pretrial. The parties should present to the court a written list of all pending motions relating to jurisdiction and venue by December 6th. Similarly, a separate enumeration of all other pending motions shall also be submitted by December 6th. Motions not included on these lists will be considered abandoned. All additional motions which should be considered at this stage in the litigation shall be filed no later than December 6, 1968.

Moreover, the parties should present a service list of attorneys at the pretrial, not to exceed one lawyer for each party, regardless of the number of actions in which

said party is named. The list will be used for mailing notices. Prior to the pretrial, plaintiffs' attorneys and defendants' attorneys shall confer separately and select one or two members to act as liaison counsel for each side. Such counsel should be authorized by stipulation to (1) act as spokesmen at pretrial conferences, and (2) receive notices on behalf of all counsel, arrange for the necessary reproduction of notices, and send copies to the attorneys on the service list.

Very truly yours,

/s/ BERNARD M. DECKER
United States District Judge

Attached to the foregoing letter was an Exhibit A which contained the following pertinent language:

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

No. 67 C 1899

STATE OF ILLINOIS, *et al.*,

Plaintiffs,

—VS.—

HARPER & ROW PUBLISHERS, INC., *et al.*,

Defendants

AND RELATED CASES.

EXHIBIT A

* * * * *

II. ITEMS NOT ON THE AGENDA

1. EXHIBIT E. National Pretrial Order No. 1 decided authoritatively that the documents requested by Exhibit E should be produced. Plaintiffs will be allowed to copy the grand jury documents presently held by the government but may not remove them.

* * * * *

APPENDIX D

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Name of Presiding Judge, Honorable Bernard M. Decker

Cause No. 67 C 1899 December 13, 1968.

STATE OF ILLINOIS

v.

HARPER & ROW PUBLISHERS, INC., *et al.*,
and Related Cases

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

ORDER

Section 7(a) of National Pretrial Order No. 1 is hereby supplemented as follows:

"For good cause appearing, each plaintiff may, on or after December 16, 1968, inspect and copy the documents described in exhibit E which are now in the custody of the antitrust division of the Justice Department. These documents shall be subject to the

same restrictions which are outlined in section 7(b). Defendants may claim confidentiality and privilege by filing a list of such restricted documents with the clerk of the court by December 16, 1968."

Furthermore, as indicated in open court, prior to December 23, 1968, plaintiffs' attorneys will refrain from disclosing the information in all documents, thus granting the defendants additional time in which to specify the documents which are confidential or privileged.

Finally, defendants' motion for a stay of section 7 of this court's July 16, 1968 order, as amended by the preceding paragraphs, is denied. The question of "good cause" was fully considered by (1) the Coordinating Committee for Multidistrict Litigation, which held a hearing in Kansas City on April 19, 1968, and (2) this court, both prior to its July 16, 1968, ruling and again on December 6, 1968, when defendants' motion was briefed and reargued.

ENTER:

/s/ BERNARD M. DECKER
United States District Judge

Hand this memorandum to the Clerk.

Counsel will not rise to address the Court until motion has been called.

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1968

HARPER & ROW PUBLISHERS, INC., *et al.*,

Petitioners,

VS.

BERNARD M. DECKER, United States District Judge, *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners, and of the opposition of the respondents thereto,

IT IS ORDERED that Section 7 of the order of the United States District Court for the Northern District of Illinois, of July 16, 1968, be, and the same is hereby, stayed providing a petition for a writ of certiorari in the above-entitled cause is filed in this Court on or before February 10, 1969. Should such petition be so filed, this stay is to remain in effect pending the Court's action on the petition. In the event the petition for a writ of certiorari is denied, this stay is to terminate automatically. Should the petition for a writ of certiorari be granted, this stay is to continue pending the issuance of the judgment of this Court.

THURGOOD MARSHALL
Associate Justice of the Supreme Court of the United States.

Dated this 18th
day of January, 1969.

APPENDIX F

Rule 34 of the Federal Rules of Civil Procedure, 28 U.S.C. Rule 34, provides that:

> "Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

* * * * *

28 U.S.C. §1407 provides as follows:

> "(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.

Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

"(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

"(c) Proceedings for the transfer of an action under this section may be initiated by—

(i) the judicial panel on multidistrict litigation upon its own initiative, or

(ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

"The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel's order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the

district court from which the action is being transferred. An order denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

"(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

"(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders susbequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.

"(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

"(g) Nothing in this section shall apply to any action in which the United States is a complainant aris-

ing under the antitrust laws. "Antitrust laws" as used herein include those acts referred to in the Act of October 15, 1914, as amended (38 Stat. 730; 15 U.S.C. 12), and also include the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13, 13a, and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117; 15 U.S.C. 56); but shall not include section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a).

Added Pub.L. 90–296, § 1, Apr. 29, 1968, 82 Stat. 109."